FILED
AUG 12 1944
CHARLES ELMORE CROPLEY
CLERK

35

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 338

CARROLL FRANKLIN JOHNSTON, AN INFANT, BY REBECCA L. GERMAN, HIS NEXT FRIEND AND GUARDIAN, AND REBECCA L. GERMAN, IN HER OWN RIGHT,
Petitioners,

vs.

W. F. JOHNSTON, MAMIE L. JOHNSTON, LUCY J. IDEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

ROBERT A. MCINTYRE,
MINITREE JONES FULTON,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
I. History of cause and summary statement of matters involved	2
II. Final decree of State Court appealed from	5
III. Value of the estate in controversy	6
IV. Questions involved and reasons relied on for granting the writ	6
Brief in support of petition	11
Opinion of Court below	11
Jurisdiction	12
Statement of cause	13
Specification of errors	17
Summary of argument	18
Addenda	27

Table of Cases Cited.

Ackerman v. *Ackerman*, 115 Fed. 124, 52 C. C. A. 568	24
Adair v. *U. S.*, 208 U. S. 161	18
Allgeyer v. *La.*, 165 U. S. 578	18
American Sugar Ref. Co. v. *New Orleans*, 181 U. S. 859 at 861	12
Eldred v. *Eldred*, 97 Va. 606 at 630	17
Fout v. *Hanlin*, 169 S. E. 743 at 745	18
Goodman v. *Goodman*, 150 Va. 42 at 45-46	20
Gregg Dyeing Co. v. *Query*, 52 S. Ct. 631	19
Hamlin v. *Grogan*, 257 Fed. 69, 168 C. C. A. 227	25
Hanover Ins. Co. v. *Harding*, 272 U. S. 494 at 509-510	22
Hoover F. Ins. Co. v. *Harding*, 272 U. S. 494 at 509-510, 47 S. Ct. 179, 71 L. Ed. 372, 49 A. L. R. 713	22
Jewell's Lessee v. *Jewell*, 1 How. 234	24
Johnston, et al. v. *Johnston, et al.*, 181 Va. 357, 25 S. E. (2d) 274	11
Kester v. *Kester*, 146 S. E. 625 at 627	20
Lochner v. *New York*, 198 U. S. 45	18

Page

Luther v. *Luther*, 95 S. E. 594 at 595 21
Meister v. *Moore*, 96 U. S. 76 ..... 7, 12, 18, 23
McClaugherty v. *McClaugherty*, 180 Va. 51 at 62-64, 65 ..... 9, 21
Oldfield v. *Davis*, 100 Va. 250 at 255 17
Payne v. *Payne*, 295 Fed. 970, 54 App. D. C. — 25
Pickens v. *O'Hara*, 200 S. E. — 19
Pierre v. *State of La.*, — 59 S. Ct. 536, 306 U. S. 354 24
Press Pub. Co. v. *Monroe*, 164 U. S. 367 12
St. Louis Southwestern Ry. Co. v. *Ark.*, 235 U. S. 350 at 362 22
State v. *Pierre*, 180 So. 630, 189 La. 764 24

STATUTES CITED.

Code of Virginia, 1942, Annotated, Section 2 27
5117 27
5264 27
5269 27
5270 27
Judicial Code, Sec. 237, as amended 12

TEXTS CITED.

7 C. J. 948 .....
Kent's Com., 13th Ed., p. 87 23
9 L. R. A. 1916 C .....
Minor's Insts. (2d Ed.), Vol. I, p. 243 .....
3 Ruling Case Law, Sec. 3, pp. 723-4 21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 338

CARROLL FRANKLIN JOHNSTON, AN INFANT, BY REBECCA L. GERMAN, HIS NEXT FRIEND AND GUARDIAN, AND REBECCA L. GERMAN, IN HER OWN RIGHT,
Petitioners,

vs.

W. F. JOHNSTON, MAMIE L. JOHNSTON, LUCY J. IDEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

To the Honorable Chief Justice and Associates of the Supreme Court of the United States:

Your petitioners, Carroll Franklin Johnston, an infant, by Rebecca L. German, his next friend and guardian, and Rebecca L. German in her own right, file this their petition for writ of certiorari to review a final decree entered in this cause on March 13, 1944, by the Supreme Court of Appeals of Virginia, the highest Court of that State. A printed Transcript of the Record of this cause is filed herewith, marked "Exhibit A," and is made a part of

this application for writ of certiorari in compliance with Rule 38 of this Honorable Court, together with the required additional copies thereof.

History of Cause, and Summary Statement of Matters Involved.

1. On November 30, 1938, your petitioners instituted a suit in *equity* in the Circuit Court of Fauquier County in the State of Virginia, against the above named defendants and R. C. Iden, Elizabeth Johnston, F. Ray Johnston and Elizabeth Johnston, his wife, and F. Ray Johnston and R. C. Iden, Administrators of Manley Allen Johnston, deceased, claiming to be his next of kin and heirs at law, he having died intestate leaving an estate valued at more than $95,000.00 (R. 16, 17).

2. The purpose of the suit was to establish that your petitioner, Carroll Franklin Johnston, an infant, was the son and only child of Manley Allen Johnston and said Rebecca L. Johnston, now Rebecca German, and as such was his heir at law, and distributee of his said father's said estate, and that he inherited the same and was entitled thereto, subject only to the marital or dower right therein of his said mother, Rebecca L. Johnston, now German, and to quiet their title in and to said estate, and for general relief (R. 13-18); and that Rebecca L. German, formerly Johnston, the mother of your infant petitioner, Carroll Franklin Johnston, was the common law wife of Manley Allen Johnston (sometimes referred to in the Record as Allen Manley Johnston).

3. Thereupon said Circuit Court decreed that Complainants "do proceed to take their evidence and otherwise prepare the cause for hearing" (Decree, R. 19-20), which they did in part, and the evidence *then* taken is set out in the R. 21-29.

4. Your petitioners then, by leave of Court, filed their Amended Bill of Complaint so as to make it conform to the proofs already taken and for additional relief, and, among other things, asked for the specific performance of an undertaking of Manley Allen Johnston, the father of your infant petitioner, to give him, his only child, Carroll Franklin Johnston, a good education, put him through High School, and what he, Manley Allen Johnston, had when he died, and for general relief prayed for in both the original and amended Bills; and it was, thereupon, decreed that "the proofs already taken be retained and that the defendants have leave to file their answer, demurrer, motion to strike, or such other pleadings as they may be advised" to said Amended Bill (R. 94-95).

5. The defendants then *demurred* to said Amended Bill on the grounds:

"(1) That the allegations made therein were insufficient in law, vague, indefinite, and constituted conclusions of law rather than * * * of facts; (2) that it contained no allegation which gave rise to any cause of action in contract, or tort, or otherwise; (3) that it alleged no undertaking or covenant by said Manley Allen Johnston binding upon him or the defendants; (4) that it did not allege any consideration to support any undertaking or covenant intended to be alleged in the Amended Bill of Complaint; and (5) that it is conjectured by defendants that complainants intend to allege the existence of a contract and breach thereof by Manley Allen Johnston, and that the Amended Bill of Complaint, therefore, endeavored to state an entirely new case foreign to the case alleged in the Original Bill and one which cannot be prosecuted in this cause" (R. 95-96). The defendants *also filed their Plea* to the Amended Bill *in which they simply denied* that said Manley Allen Johnston, or his agent, *had ever signed any*

contract, memorandum or note in writing agreeing to give the complainant, Carroll Franklin Johnston, a "good education" or to put him "through High School," and what he, the said Manley Allen Johnston, had when he died (R. 96). They never filed an answer thereto; but *only denied in their said Plea that he had signed a contract in writing,* etc. So, that the *Amended Bill of Complaint* was taken for *confessed,* except in so far as the above Plea denied that Manley Allen Johnston *had signed any such contract, memorandum or note in writing* (R. 95-96).

6. The said Circuit Court, on February 6, 1942, then entered a decree sustaining said demurrer, on the *Second, Third* and *Fourth* grounds thereof; and, in effect, overruled the First ground of the demurrer and thereby held that the Amended Bill was sufficient in law and alleged a cause of action in your petitioners against the said defendants; *but* the said Circuit Court, nevertheless, *dismissed* said cause, to which action your petitioners excepted (R. 97-99).

7. Thereafter your petitioners appealed to the Supreme Court of Appeals of Virginia; and, on April 26, 1943, it handed down an opinion holding that said decree appealed from "*was not a final decree,* but was interlocutory", and *remanded the cause* to the Circuit Court, "with leave to the parties to prosecute and defend their respective rights therein, and to be further proceeded in to *final* decree as though said appeal had never been granted" (R. 99-101). The effect of the said decree of the Supreme Court of Appeals of Virginia was to overrule and to reverse the said final decree entered by the Circuit Court of Fauquier County sustaining said demurrer and dismissing said cause, and to *require* defendants to proceed and take evidence to establish their defenses, if any they had. The printed opinion of the said Court of Appeals, on that Ap-

peal, is set out in the R. 99-101, and is reported in 181 Va. at pages 357-358.

8. Thereafter complainants, your petitioners, finished taking their evidence (R. 109-124; 132-195). The defendants, however, *never itnroduced any evidence*, and on *October 26, 1943*, the said Circuit Court entered a *final* decree holding that, * * *

> "the defendants having indicated to the Court that they did not consider it necessary, *and did not propose to take any evidence*, this cause was argued by counsel on the 18th day of October, 1943; and the Court having heard the argument of counsel, took said cause under advisement, and the Court now having reached an opinion regarding the issues of this cause, and being of the opinion that the complainants have wholly failed to establish the existence of *any* common law marriage between Manley Allen Johnston, deceased, and the complainant, Rebecca L. German, (formerly Edmonds) and that the relationship between said parties was purely meretricious, and that no marriage of *any* kind or character existed between the parties, not even such a marriage 'deemed null in law,' as would legitimate the issue under Section 5270 of the Virginia Code, has been established, doth adjudge, order and decree that the bill and amended bill in this cause be and the same are hereby dismissed; to which ruling of the Court, and the entry of this decree, complainants by counsel except" (R. 196-197).

Final Decree of the Supreme Court of Virginia Appealed From.

9. Your petitioners thereupon appealed from the said *final* decree of the Circuit Court to the Supreme Court of Appeals of Virginia (R. 102-131); and, on *March 13, 1944*, it entered a *final decree* in said cause refusing to grant said appeal, and dismissed said cause (R. 197), and thereby affirmed the above decree of the Circuit Court of Fauquier

County entered on October 26, 1943, and thus deprived your petitioner, Carroll Franklin Johnston, an infant, and the *only* child of his father, Manley Allen Johnston, deceased, of his property and his lawful right to take and inherit the estate of his father who had died intestate, and also of his legitimacy; and also deprived your petitioner, his mother, the common law wife of Manley Allen Johnston, of her marital or dower right and interest in the estate of her husband, the said Manley Allen Johnston, and deprived them of the equal protection of the law and of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, the laws of the land, and of the Statute of Virginia, Code of Virginia, 1942, Sections 2 and 5270.

Value of Estate in Controversy.

10. The amount of money in controversy exceeds the sum of $3,000.00, exclusive of interest.

The time for filing the petition for certiorari in this cause was extended to and including August 12, 1944, by Honorable Harlan F. Stone, Chief Justice of the United States, on June 9, 1944 (R. 198).

Questions Involved and Presented and Reasons Relied On for Allowance of Writ of Certiorari Herein.

A. The Supreme Court of Appeals of Virginia, in its final decree of March 13, 1944, affirming said final decree of said Circuit Court of Fauquier County entered on October 26, 1943, has erred in holding, that no common law marriage had been entered into between your petitioner, Rebecca L. German, and Manley Allen Johnston, and that Carroll Franklin Johnston, their only son and child, was not their legitimate issue, and has thereby deprived your petitioners, Carroll Franklin Johnston, an infant, and Rebecca L. German, his mother and the widow of Manley Allen Johnston,

of their property and property rights in the estate of which Manley Allen Johnston died seized and possessed, in violation of the Code of Virginia, 1942, Annotated, Section 2 continuing the common law of England in force in Virginia, and Section 5270, which provides: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate", and the decision of this Court, *Meister* v. *Moore*, 96 U. S. 76, and in violation of the Fourteenth Amendment to the Constitution of the United States, which provides: * * * "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or *property*, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. The Supreme Court of Appeals of Virginia, in its said final decree of March 13, 1944, has rendered a decision in conflict with the decisions of the Courts of last resort of the other States and in conflict with the applicable decisions of this Court, especially *Meister* v. *Moore*, 96 U. S. 76, holding "that a marriage regularly made according to the common law without observing statutory regulations, is a valid marriage."

C. The Supreme Court of Appeals of Virginia, in its final decree of March 13, 1944, has disregarded the statute law of Virginia, Code of 1942, Sections 2, 5117, 5264, 5269 and 5270, and decided important questions of statutory and general law in a way probably *not* tenable and in conflict with the great weight of authority.

D. The Supreme Court of Appeals of Virginia, in its said final decree of March 13, 1944, has erroneously decided that your petitioner, Carroll Franklin Johnston, is not the "legitimate issue" of Manley Allen Johnston and

did not inherit his estate upon his death, contrary to the said State statute, and the presumption of general law in favor of legitimacy, and contrary to the weight of all the evidence, which was uncontradicted, and to law and the great weight of authority, and with the very right and justice of the cause,—and has thereby deprived your petitioners of their property and the due, just and regular administration of the law, and has arbitrarily disregarded the statute laws of Virginia, set at naught the contract and status of marriage between Manley Allen Johnston and Rebecca L. Edmonds (now German), and held that your petitioner, Carroll Franklin Johnston, is not the "legitimate issue", son and heir at law of his proven and admitted father, Manley Allen Johnston, and has thereby deprived your petitioner, Carroll Franklin Johnston, an infant, of his lawful right to inherit his father's estate, and his mother, Rebecca L. Johnston (now German), of her dower interest therein in violation of law and the Fourteenth Amendment of the Constitution of the United States.

E. The Supreme Court of Appeals of Virginia, in its final decree of March 13, 1944, has erroneously held that Manley Allen Johnston and Rebecca L. Edmonds (now German) did *not have the right* to contract or enter into a common law marriage, either in Virginia or the District of Columbia or in the other States where they lived together as man and wife, which right of contract was not denied to them by any statute, but was denied to the courts of Virginia under Title 2, Section 2 of the Statute law,—Code of Virginia,—and has thereby deprived your petitioner, Carroll Franklin Johnston, their infant son, without any fault of his, of his legitimacy and the right to inherit the estate of his father, Manley Allen Johnston, upon his death, and has also deprived his mother of her dower right in said estate in the absence of any positive State law declaring

that common law marriages are invalid or void. Said final decree is in conflict with the holdings of this Honorable Court. *Meister* v. *Moore, supra.*

F. The Supreme Court of Appeals of Virginia, in its said final decree of March 13, 1944, has failed to give effect to its own State statute, Sections 2 and 5264, 5269 and 5270 of the Code of Virginia, 1942, Annotated (enacted in 1775), in so far as the same applies to the legitimacy and right of inheritance of your petitioner, Carroll Frances Johnston, an infant, and has rendered a decision in conflict with the said statute which provides: "The issue of marriages deemed null in law * * * shall nevertheless be legitimate", and with its own decision construing and holding that said Statute, Section 5270, "legitimatizes the issue of common law marriages" (*McClaugherty* v. *McClaugherty*, 180 Va. 51 at 64), and has thereby deprived your petitioner, Carroll Franklin Johnston, the legitimate issue and heir at law of his father, of his estate and the benefit and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of Virginia at Richmond, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case, entitled on its docket, Carroll Franklin Johnston, an infant by Rebecca L. German his next friend and guardian, and Rebecca L. German in her own right, Petitioners, vs. W. F. Johnston, Mamie L. Johnston his wife, non-resident defendants, Post Office address 414 Berkshire Street, Oak Park, Illinois, Lucy J. Iden, R. C. Iden her husband, Elizabeth Johnston, F. Ray Johnston and Elizabeth Johnston his wife; and F.

Ray Johnston and R. C. Iden, administrators of Manley Allen Johnston, Deceased, Defendants, and that the final decree of the said Supreme Court of Appeals of Virginia may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

This August 11th, 1944.

CARROLL FRANK JOHNSTON,
An infant,

By REBECCA L. GERMAN,
His next friend and Guardian,
and
REBECCA L. GERMAN,
In her own right,

By ROBERT A. McINTYRE,
Masonic Building,
Warenton, Virginia;
MINITREE JONES FULTON,
1128 Mutual Building,
Richmond 19, Virginia,
Counsel for Petitioners.